Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1833

NADINE O. MONROE,

Appellant,

versus

FLOYD R. MONROE, JR.,

Respondent.

APPEAL FROM THE SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

NADINE O. MONROE,

Appellant,

versus

FLOYD R. MONROE, JR.,

Respondent.

APPEAL FROM THE SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

This is an appeal from the final order of the Supreme Court of Connecticut entered in this action on March 27, 1979. The Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The final order of the Supreme Court of Connecticut, No. 9042-9088 consolidated, dated March 27, 1979. (Appendix, p. A-2).

The order and opinion of the New London County Superior Court, Judge Daly, No. 36506 dated April 12, 1978. (Appendix p. A-16).

The order and opinion of the New London County Superior Court, Judge Jacobs, No. 36506, dated March 14, 1978. (App. p. A-18).

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 USC, Section 1257 (2), this being an appeal which draws into question the validity, as applied in this case, of Connecticut General Statutes, Sec. 52-434, infra, page 3, on the grounds that it is repugnant to the Constitution of the United States.

In the event the court does not consider appeal the proper mode of review, the appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for a writ of certorari pursuant to Title 28 USC, Section 1257 (3).

ADDITIONAL GROUNDS OF JURISDICTION

The appellant also contends that the courts below erred in failing to address other constitutional questions not subject to review on appeal. In particular the courts of Connecticut have ignored the due process and equal protection provisions embodied in the Fifth and Fourteenth Amendments to the United States Constitution that insure compliance with statutorially mandated court procedure.

These errors are included in the statement of questions presented by the appeal, hereinafter set forth. If these were the only errors complained of, the appellant would be limited to a petition for a writ of certorari under 28 USC, Section 1257 (3). They are included in this appeal under the authority of Prudential Insurance Co. v. Check, 259 U.S. 530, 547 (1922), and Flourey v. Weiner, 321 U.S. 253, 263 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case invloves the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves Connecticut General Statutes, Section 52-434 which states:

"Each judge of the supreme court, each judge of the superior court, each judge of the court of common pleas who ceases to or has ceased to hold office because of retirement other than under the provisions of Section 51-49 (disability) shall be a state referee during the remainder of his life. The superior court or the court of common pleas may, with the written consent of the parties or their attorneys, refer any case pending before such court in which the issues have been closed to such a state referee who shall have and exercise the powers of the superior court or court of common pleas in respect to trial, judgment and appeal in such cases. Each judge of the circuit court who has ceased to hold office because of retirement other than under the provisions of Section 51-49 (disability) shall be a referee during

the remainder of his life to whom, the court of common pleas may, with the written consent of the parties or their attorneys, refer any case pending in such court in which the issues have been closed. Such referee shall hear such case and report the facts to the court by which the case was referred. Each judge of the juvenile court who ceases or has ceased to hold office because of retirement other than under the provisions of Section 51-49 (disability) shall be a state referee during the remainder of his life to whom senior judges of the juvenile court may, with the written consent of the child concerned, either of his parents or his guardian or his attorney, refer any matter pending in such court. Such referee shall hear such matter and report the facts to the court for the district from which the matter was referred. Each hearing by a state referee shall be held in a suitable room to be provided by the public works commissioner, in a courthouse in the county where the case is pending unless the parties or their attorneys stipulate in writing that such hearing may be held elsewhere. Such state referee may have the attendance of a sheriff or deputy sheriff at any hearing before him, and the sheriff or deputy sheriff shall receive the same compensation provided for attendance at regular sessions of the court from which the case was referred which compensation shall be taxed by such state referee in the same manner as similar costs are taxed by the judges of the court. Such state referee may compel the attendance of any witness summoned to appear before him at any hearing, in the same manner as attendance of any witness may be compelled in the referring court,

and may punish for any act of contempt committed in his presence while engaged in such hearing in the same manner and to the same extent as judges of such court. Each state referee shall receive for acting as such referee or as a single auditor or committee of any court, in addition to his retirement salary, the sum of fifty dollars and his expenses, including mileage, for each day he is so engaged, said sums to be taxed by the court making such reference in the same manner as other court expenses. The chief justice may also appoint, from qualified members of the bar of the state, so many state referees as he may from time to time deem advisable or necessary. No such designation or appointment shall be for a term of more than one year. Each state referee appointed by the chief justice from members of the bar shall receive such reasonable compensation and expenses as may be determined by him."

This case also involves Article Fifth, Section 6 of the Connecticut State Constitution that states:

"No judge or justice of the peace shall be eligible to hold his office after he shall arrive at the age of seventy years, except that a chief justice of judge of the supreme court, a judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee."

QUESTIONS PRESENTED

1. Whether or not Connecticut General Statutes, Section 52-434 is repugnant to the Constitution of the United States.
2. Whether or not statutorially mandated procedure can be assumed or must be a proper, visible part of the record in order to satisfy federal due process and equal protection provisions of the Constitution of the United States.
3. Whether or not attorneys of record can, by agreement, deny their client's the right to have their case adjudicated by a constitutionally approved, and constitutionally accountable, judge of the superior court.
4. Whether or not a judgment rendered by a "special tribunal" exercising unconstituional judicial power is invalid and, therefore, null and void.

STATEMENT OF THE CASE

The appellant/plaintiff instituted, through a lawyer, this action for divorce in April, 1969 in New London County Superior Court.

During the marriage, in addition to performing her homemaking and conjugal duties and rearing of the two minor children of the marriage, the appellant provided the residence for the family. This house was also used as a full time office to conduct the school transportation business of the husband. In anticipation of a higher standard of living and financial security for the family, the wife worked, without compensation, from 1961 to 1968 assisting the husband in the business.

When the husband's business approached the million dollar bracket, the husband deserted the wife and children. He then conspired with the attorneys to deny the wife and children of a fair and equitable settlement of this matter, establishing a pattern of fraud through perjury, falsificaion of financial affidavits and repeated refusal to reveal the worth of the defendant's assets.

Throughout the long drawnout litigation the appellant was handicapped by dishonest and incompetent lawyers who failed and refused to obtain the necessary financial information, from the defendant, that was needed to advance this case. In January 1972, when the appellant was changing attorneys for the third time in an attempt to get this case into court for adjudication, the defendant filed a cross-complaint and tried to "push-through" an uncontested divorce while the appellant was without counsel.

To prevent the appellant from getting a fair hearing in court the attorneys, in collusion, illegally transferred this case to a superior court referee prejudiced in favor of the defendant.(Troland).

In January 1973, prior to the hearing of this case, the Connecticut Supreme Court overturned a decision by Referee Troland and criticized him for condoning perjury and "a fraud committed upon the court" by a local wealthy businessman during a divorce proceeding. Pappas v. Pappas, 164 Conn. 242.

Even then the appellant's lawyer refused to remove the referee from the case and the case went forward. Under duress of (1) unethical legal counsel, (2) default,

if she did not proceed, that would enable the defendant to obtain the divorce on his cross-complaint, and (3) having the case heard by an unethical referee already known to be prejudiced in favor of the defendant, the appellant at the scheduled hearing accepted a "token" living allowance for herself and her children rather than have the referee make a financial determination in the matter.

The 83 year old referee granted the plaintiff a divorce on the grounds of desertion and although the record shows that the defendant never did make the financial disclosure necessary to determine a fair settlement, the referee validated the agreement and reminisced about the earlier case he had adjudicated for the defendant and his lawyers.

After repeated attempts to obtain a lawyer to reopen this case had failed, the plaintiff in January, 1978 filed in the New London County Superior Court, a pro se motion to vacate judgment for lack of jurisdiction charging that the requirements of sec. 52-434 had not been met in transferring the case to the referee and therefore the referee lacked the authority to adjudicate the case. The plaintiff charged that these defects violated federal due process and equal protection provisions of the U.S. Constitution.

The two defects cited by the appellant plaintiff were: (1) that she had not given consent for the referral, and (2) that the motions for reference, filed by the lawyers, had never been heard and acted upon by the court and the court had never assigned the referee to the case as required by law.

The defendant's attorney, in turn, filed a motion to erase that was granted by Judge Jacobs on March 14, 1978. The appellant appealed to the Supreme Court of Supreme Court of Connecticut.

Simultaneously the plaintiff filed another motion to vacate judgment claiming that the statute empowering superior court referees to render final judgment was unconstitutional and violated not only the First, Fifth and Fourteenth Amendments to the United States Constitution but Article First, Sec. 1, Article Second, and Article Fifth, Section 1, 2, and 6 of the Connecticut Constitution.

This motion to vacate judgment was denied by Judge Daly on April 12, 1978 and the plaintiff filed a timely appeal to the Connecticut Supreme Court. The two appeals were consolidated at the Supreme Court level.

The Connecticut Supreme Court ruled that although the plaintiff's actions had been jurisdictionally appropriate and timely, she had not proved that Section 52-434 was unconstitutional and that the other claims raised by the appellant were without merit.

Timely Notice of Appeal to this Court was filed in the Connecticut Supreme Court on April 30, 1979.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED

None of the courts of Connecticut addressed the federal questions raised by the appellant.

The appellant claimed a denial of federal rights guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution, charging that she had been denied her right to petition the government for a redress of grievances, due process of the law and equal protection of the law, when she was denied a constitutionally appointed and constitutionally accountable judge of the superior court to adjudicate her case because the attorneys of record, under Section 52-434, had agreed that a state referee would be substituted.

In addition to this claim the appellant also claimed that federal due process and equal protection provisions were denied her when statutorially mandated procedure, for referring a case to a referee, was not followed. And, therefore, the referee who presided in the case did not have the proper authority to do so.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The fundamental issue presented on this appeal to the United States Supreme Court is one of great public importance that affects a very large number of state litigants involved in contested, civil cases filed in the constitutional superior courts of Connecticut.

In Connecticut, superior court judges adjudicate all criminal cases and all uncontested divorce cases. Superior court referees adjudicate a very large percentage of the remaining contested, civil cases.

This appeal addresses the right of all litigants to have their cases adjudicated by a constitutionally approved and constitutionally accountable, judge of the superior court.

Statute 52-434 is contrary to the letter and intent of the Connecticut Constitution and is repugnant to the Constitution of the United States. The statute creates a class of constitutionally-deprived litigants.

The appellant argues that she was denied the right to petition for redress, due process of the law and equal protection of the law embodied in the First, Fifth and Fourteenth Amendments to the United States Constitution when her case was adjudicated by a state referee instead of a superior court judge.

The appellant argues that Section 52-434 also violates Article Fifth, Sections 1, 2 and 6; Article Second and Article First, Section 1 of the Connecticut Constitution.

The Constitution of the State of Connecticut, Article Fifth states:

Section 1. "The judicial power of the state shall be vested in a supreme court, a superior court and such lower courts as the general assembly shall from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."

"Section 2. The judges of the supreme court and of the superior court shall upon nomination by the governor, be appointed by the general assembly in such a manner as shall by law be prescribed. They shall hold their offices for the term of eight years, but may be removed by impeachment. The governor shall also remove them on the address of two-thirds of each house of the general assembly."

"Section 6. No judge or justice of the peace shall be eligible to hold his office after he shall arrive at the age of seventy years, except that a chief justice or a judge of the supreme court, a judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee."

The relevant part of Section 52-434 states,". . .each judge of the superior court . . .who ceases to or has ceased to hold office because of retirement. . shall be a state referee for the remainder of his life. The superior court. . . may, with the written consent of the parties or their attorneys, refer any case pending in which the issues have been closed to such a state referee, who shall have and exercise the powers of the superior court in regard to trial, judgment and appeal in such cases."

With gross disregard for the constitutional rights of the individual, the statute restores to the retired judges serving as superior court referees, all the judicial power they lost as a result of their constitutionally mandated retirement.

Retired judges at the age of 70 years automatically assume the position of state referee. They are not screened or reviewed by anyone before they take office for the rest of their lives. Superior court referees, exercising all the powers of a superior court judge, are not subject to periodic renomination, review and reappointment as are regular judges. Neither are these superior court referees subject to impeachment or removal from office as are the regular judges. Also, state referees are not subject to professional discipline or removal from office, under Connecticut Public Act 75-494, as are appointed judges.

At a time in life when their physical and mental abilities are steadily diminishing (ages ranging 70 into the 90's) the superior court referees account to on one and cannot be removed from office. By changing their job title, the superior court judges nave successfully circumvented the state constituional mandate that they relinquish all theirjudicial powers at the age of 70. Due to their lack of accountability, these retired superior court judges then become the most powerful tribunals in the entire country.

As section 52-434 in its entirety (p. 3) indicates, the cases heard by these referees are adjudicated separately and independently from those of the superior court. The referees set their own schedule and the referred cases do not appear on the court calendars. Also, section 51-29 that sets a time limit for judges to render their decisions, does not apply to referees. Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360; 321 A.2d 856 (1973).

In the original opinion filed by Judge Jacobs on March 14, 1978, affirmed on appeal, Jacobs ruled that Section 52-434 was not unconstitutional because "it is derived from the explicit language of Article Fifth, Section 6 of the state constitution. And because Section 52-434 stems directly from an express provision in the constitution it does not violate the doctrine of separation of legislative and judicial powers."

This ruling is not supported by case law. It is not supported by the facts.

State referees were serving in the Connecticut judicial system long before Article Fifth, Section 6 was amended to mention state referees.

In 1889, Public Acts 1889 c. 249 s. 1 established the position of the state referee and clearly defined his duties, to wit: "to hear and report the facts of a case to the court" so that the judge could more easily render a decision.

When the 1965 Constitution of Connecticut was adopted all state referees in all courts were serving as "fact-finders" to the referring court and had been serving in this capacity for 75 years. Over the years very limited powers of the court had been granted to the referee in order to facilitate their job. Never at any time from 1889, until the statute was amended in 1967 did the referees exercise judicial power and render final judgments.

It was two years after the 1965 Connecticut constitution was adopted that the statute was amended to restore to retired judges of the upper courts, all the judicial powers they had lost as a result of their retirement. (1967 P.A. 621, S. 5, 628 S. 5).

Section 52-434, as amended, is obviously inconsistent in that it creates two roles for state referees; the upper court referee as an adjudicator and the lower court referee as a fact-finder.

The history of the state referee in Florida Hill Road Corporation v. Commissioner of Agriculture, supra, is cited by the courts below. However, the lower courts have shrewdly omitted the most relevant citation from that 1973 decision by Chief Justice House that said: "Each of our state constitutions has contained an express provision prohibiting a judge from continuing to hold his office after he has arrived at the age of seventy years. . .In light of the constitutional prohibition aginst any judge holding his office after he has attained the age of seventy years, when a judge attains that age and becomes a state referee, 'it is clear that as a constitutional matter he is not a judge of the superior court'". (p. 362-63).

The state courts argue that it was the intent of the 1965 Constitutional Convention of Connecticut to allow referees to exercise all the powers of the superior court. The facts prove otherwise.

If the framers of the 1965 Constitution had wanted state referees to exercise constitutional powers these powers would have been defined in the constitution itself and not "prescribed by law." A law, even a law claimed to be sanctioned by the constitution, cannot override existing constitutional provisions.

If there had been any intent for judges to exercise judicial powers after the age

of seventy years, the retirement age of judges would have been extended so that the separation of powers safeguards would remain intact.

Evidence that the framers of the 1965 Constitution were actively opposed to judges serving after the age of 70 years is found in the Journal of the 1965 Connecticut Constitutional Convention, pp. 73, 109-10.

Proposed Resolution 181 was submitted by Mr. Bordon of West Hartford entitled "Resolution Concerning the Mandatory Retirement of Judges" to allow judges to serve as judges of the court from which they retire when the business of the court from which they retire is such as to require their services. This proposal received an unfavorable committee report and, without reconsideration, was rejected.

What could not be accomplished at the 1965 Constitutional Convention was accomplished by the Connecticut General Assembly two years later in 1967 when the legislature amended Section 52-434 to perpetuate the superior court judges.

As for retired judges serving to relieve the crowded court dockets and the large backlog of cases, let us remember that the judges themselves created this backlog by establishing Connecticut as the only state in the entire country where the judges presided only four days a week.

In addition to these arguments the appellant also claimed that Sec. 52-434 violates Article Second of the Connecticut Constitution that reads: "The powers of government shall be divided into three distinct departments and each of them confided to a separate magistracy, to wit:

those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

The appellant argued that the legislature has encroached upon judicial power in granting the inherent and supreme judicial powers of a judge to a superior court referee." State v. Clemente, 166 Conn. 501, 353 A.2d 723. (1974).

Furthermore, the appellant argued that Section 52-434 violated the Connecticut Constitution, Article First, Section 1 that states, "All men when they form a social compact are equal in rights; and no men or set of men are entitled to exclusive public emoluments or privileges from the community."

The appellant argues that the statute creates a powerful group of "backroom judges" that account to no one and cannot be removed from office. The United States Supreme Court in U.S. v. Nixon, 94 S.Ct. 3090 ruled that "No man is above the law" yet all Connecticut superior court referees are above the law.

Moreover, the appellant submits that Section 52-434 also violates federal guarantees of redress, due process and equal protection of the law, in granting attorneys the power to deny their clients the right to have their case adjudicated by a constitutionally approved and constituionally accountable judge of the superior court. The Connecticut Supreme Court erred in ruling that a client is bound by the actions of their attorney and used pre-Miranda citations to support their opinions. In Miranda v. Arizona, 386 U.S. 436 it is stated, "Only after constitutional warnings are given can the accused be held

to have knowingly and intelligently waived his rights."

The appellant's first motion to vacate judgment for lack of jurisdiction charged a violation of federal due process and equal protection guarantees in addition to violating statutory procedure. The appellant not only failed to give the "written consent" required by law, but the record also shows that the Motions for Reference, filed May 31 and June 1, were never heard by the court and never acted upon by the court. The court had never issued an order assigning a referee, (who work by assignment only), to this case. A falsified memo has been added to the jacket of this file indicating the court ordered this case referred to Referee Troland on June 1. Memos reflecting orders of the court, duly recorded on the original motion and signed by the proper authority, are used for the convenience of the clerks and are not in themselves valid orders of the court.

Furthermore, court procedure would prohibit a motion from being heard on the same day as filed; routine processing requires time. Also, superior court records prove (1) that June 1st was not a short calendar day for hearing such motions, and (2) that Judge Klau, alleged to have issued the order, was presiding in criminal court on that day.

The appellant was prevented from placing these superior court records in evidence and proceeded with the case on the face of the record. However, the Connecticut Supreme court ruled that in the absence of a valid court order for the referral, it could be assumed that the court had assigned the referee to this case. The

appellant charges that the omission of this court order is a violation of statutorially mandated procedure and as such is a denial of federal due process and equal protection provisions.

The Clerk of the Connecticut Supreme Court, in preparing the certified printed record, sought to correct the defect in the record created by the absence of a court order for reference and added the name of the present New London County Superior Court Clerk to the Motion for Reference in this record. The appellant was able to prove that the certified printed record had been falsified and a correction has been added to the certified printed record.

The appellant argues that because the superior court referee did not have proper subject matter jurisdiction in this case, either constitutionally or procedurally, the judgment he rendered is without validity and therefore, should be declared null and void.

A challenge to subject matter jurisdiction, an allegation that the judgment is void, "can be raised at any time. . .and the lack thereof cannot be waived." LaBow v. LaBow, 171 Conn. 433, 440, 370 A2d 990, (1976); Connecticut Steel Co v. National Amusements, Inc., 166 Conn. 255, 263, 348 A.2d 658 (1974); Maltbie, Conn. App. Proc. Section 45.

Federal cases in support of the appellant's arguments are: Vacchione v. Wohlgemuth, 426 F. Supp. 1297 (D.C. Pa. 1977) states, "A judgment which issues without subject matter jurisdiction is void and the principal of res judicata does not of its own force breathe validity into the judgment."

"A void judgment is a legal nullity and may be challenged not only directly but by collateral attack in a proceeding in any court where its validity has come into issue." Graciette v. Star Guidance, Inc., 66 FRD 424, (D.C. NY 1975).

"Invalidity of judgment for want of jurisdiction may be asserted at any time in any proceeding in which the judgment comes into issue." Diva Lab Aktiengesellschaft v. DeLoney, 237 F. Supp. 868, (1965).

"A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside. . .A void judgment is no judgment at all and is without legal effect." Jordan v. Gilligan, 500 F. 2d 701, cert. denied, 95 S.Ct. 1966, 421 U.S. 991, 44 L.Ed. 2d 481, (C.A. Ohio 1974).

CONCLUSION

For the reasons stated above it is respectfully submitted that the federal question is substantial and of great public importance. It is further submitted that this Court should note probable jurisdiction and set this matter for argument.

RESPECTFULLY SUBMITTED

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APPENDIX

IN THE

CONNECTICUT SUPREME COURT

NADINE O. MONROE — No. 9042-9088 Consolidated

vs

FLOYD R. MONROE, JR. — APRIL 27, 1979

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Nadine O. Monroe, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Connecticut Supreme Court denying the Appellant's Appeal from the Superior Courts of Connecticut, entered in this action on March 27, 1979.

This appeal is taken pursuant to 28 U.S.C. (2).

THE APPELLANT

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Entered April 30, 1979
Clerk of the Supreme Court
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APPENDIX

CONNECTICUT SUPREME COURT

January Term, 1979

NADINE O. MONROE

vs

No. 9042-9088
Consolidated

FLOYD R. MONROE, JR.

Argued: January 2, 1979

BEFORE:

John Cotter, Chief Justice of the Supreme Court of Connecticut
Joseph W. Bogdanski, Associate Justice, Supreme Court
Ellen Peters, Associate Justice Supreme Court
Maurice Sponzo, Judge of the Superior Court
Leo Parsky, Judge of the Superior Court

Decision released March 27, 1979

OPINION

Written by Justice Peters

Motions by the plaintiff to vacate judgment of divorce, brought to the Superior Court in New London County where the court, at separate hearings before Jacobs, J. and Daly, J. denied the plaintiff's motion to vacate and granted the defendant's motion to erase, and appeal by the plaintiff to this court. NO ERROR.

The plaintiff, Nadine O. Monroe, and the defendant, Floyd R. Monroe, Jr., were married in 1956 and divorced in 1973. Several years later the plaintiff initiated

the present proceedings to vacate the judgment of divorce. The plaintiff filed two motions, one in January, 1978 and another in March, 1978, claiming that the state referee who entered the decree of dissolution of her marriage lacked the jurisdiction to do so. In response to each motion, the defendant countered with a motion to erase because the plaintiff's motions were not filed within the term of court in which the judgment of divorce had been rendered, and thence were untimely. The trial court denied the motion's of the plaintiff and granted the motions of the defendant. The plaintiff thereupon appealed each denial to this court, and we consolidated the two appeals.

The basic facts established by the record below are as follows: The plaintiff initiated an action for a separation or divorce in 1969. As amended in 1973, the complaint charged the defendant with intolerable cruelty, wilful desertion, and adultery, and sought child custody and financial relief. The defendant, after reference of the case to a state referee, consented to having the matter heard as uncontested on the plaintiff's complaint. A hearing was held by the referee on February 6, 1973, in accordance with this understanding. Both the plaintiff and the defendant were present in the courtroom; each was represented by counsel; neither was called upon to testify. Counsel for the plaintiff presented the plaintiff's amended complaint and proposed the terms of a stipulated settlement to be incorporated in the judgment file. Although the stipulation for settlement was in

writing, neither the plaintiff nor the defendant had signed it. Counsel informed the court that "each aspect" of the settlement had been discussed by each counsel with each client and that each was willing to accept its terms if the court found the settlement to be fair and reasonable. The court granted the plaintiff a divorce on the grounds of desertion and incorporated the stipulated settlement into its judgment decree. Neither party ever appealed from the entry of this judgment. The defendant subsequently remarried.

The plaintiff's motion to open judgment[1] challenges the subject matter jurisdiction of the referee to render the judgment of divorce. The motion filed on January 17, 1978 claims that there were jurisdictional flaws in the actual reference of her case to the referee, pursuant to General Statutes, Sec. 52-434, while the motion filed March 20, 1978, claims that the referee lacked constitutional power, despite Sec. 52-434, to render final judgment in any case. We will consider these claims in reverse order.

As a preliminary matter, in view of the defendant's continued insistence that these claims were not properly before the trial court, and are not now properly before this court, we chould clarify our own jurisdiction in this case. The defendant argues that theorders below are not appealable (1) because they do not constitute final judgments and (2) because they are untimely, since they were not filed within the term of the court at which the judgment of divorce was rendered. We find neither of these arguments persuasive.

This court has had numerous occasions

to define finality of judgments. A recent comprehensive statement identifies a variety of criteria: "One test is whether the order or action terminates a separate and distinct proceeding. Dewart v. Northeastern Gas Transmission Co., 139 Conn. 512, 514, 95 A2d 381. Another test lies in the effect of an order 'as concluding the rights of some or all of the parties'; Banca Commerciale Italiana Trust Co. v. Westchester Artictic Works, Inc., 108 Conn. 304, 307, 142 A. 838; Gores v. Rosenthal, 148 Conn. 218, 221, 169 A.2d 639; and finally, if the rights of the parties are concluded so that further proceedings cannot affect them, then the judgment is final. State v. Fahey, 146 Conn. 55, 57, 147 A.2d 476; Watson v. Howard, 138 Conn. 464, 467, 86 A.2d 67; Northeastern Gas Transmission Co. v. Brush, 138 Conn. 370, 373, 84 A.2d 681." Prevedini v. Mobil Oil Corporation, 164 Conn. 287, 292, 320 A.2d 797 (1973). Whichever of these tests is employed, it is clear that the orders denying motions to open judgment are appealable judgments. Zingus v. Redevelopment Agency, 161 Conn. 276, 281, 287 A.2d 366. (1971)

It is equally clear that these appeals are not precluded by the common law rule, recognized in Cichy v. Kostyk, 143 Conn. 688, 690, 125 A.2d 483 (1956), that ordinarily limits the power of a court to open, modify, or vacate its judgments "to the term of court at which the original judgment was rendered." The Cichy rule limits the opening of judgments that are arguably improper or erroneous. Significantly, Cichy itself permitted belated exercise of jurisdiction with the consent of the parties. Cichy does not address the timeliness of attacks on

judgments that are alleged to be not merely voidable but void. The plaintiff's motions challenge the power of the tribunal that adjudicated her case to hear and to determine the cause of action presented to it. Brown v. Cato, 147 Conn. 418, 422, 162 A.2d 175 (1960). A challenge to subject matter jurisdiction, an allegation that a judgment is void, "can be raised at any time... and thelack thereof cannot be waived." LaBow v. LaBow, 171 Conn. 433, 440, 370 A.2d 990 (1976); Connecticut Steel Co. v. National Amusements, Inc., 166 Conn. 255, 263, 348 A.2d 658 (1974); Maltbie, Conn. App. Proc., Sec. 45.

The plaintiff's appeals from the orders of the trial court are therefore both jurisdictionally appropriate and timely. This conclusion does not mean that collateral attacks on judgments are favored. On the contrary, every presumption favors the jurisdiction of a court; Six Carpenters, Inc. v. Beach Carpenters Corporation, 172 Conn. 1, 6, 372 A.2d 123 (1976); and the regularity of its processes. Jensen v. Nationwide Mutual Ins. Co., 158 Conn. 251. 260, 259 A.2d 598 (1969). The modern law of civil procedure suggests that even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments, particularly when the parties have had a full opportunity originally to contest the jurisdiction of the adjudicatory tribunal. James & Hazard, Civil Procedure (2d Ed. 1977) Sec. 13.16, esp. 695-97; Restatement (Second), Judgments Sec. 15, (Tent. Draft #5, 1978). We turn now to the merits of the plaintiff's allegations.

The more wide-ranging of the plaintiff's claims challenges the constitutionality of Sec. 52-434 of the General Statutes.[2] It is argued that this section, which empowers retired judges, upon designation as state referees, to exercise the same powers as the Superior Court, violates article second;[3] article fifth, sec. 1, 2 and 6;[4] and article first, sec. 1 of the Connecticut constitution. The plaintiff maintains that it is unconstitutional to permit judges who must retire at the age of seventy years thereafter to exercise judicial power exclusively vested in constitutional courts. This argument relies on the doctrine of separation of powers recently restated in cases such as State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974), and Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1968). These cases are, however, inapposite because they concern legislative enactments that lack specific constitutional sanction. Section 52-434 was amended, in 1967, to conform to the enabling provision of article fifth, sec. 6, of the 1965 Connecticut Constitution, namely: "No judge or justice of the peace shall be eligible to hold his office after he shall arrive at the age of seventy years, except that a chief justice or judge of the supreme court, a judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee."

This court has, on several occasions since 1965, reviewed, with approbation, the role of the state referees. Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 365-66, 321 A.2d 856 (1973), describes the history of the position of state referees and concludes (p.362) that such a referee "is not a 'judge of the superior court or the court of common pleas' but is sui generis, and sits as a special tribunal." See also Prince v. Sheffield, 158 Conn. 286, 291. 259 A.2d 621 (1969), and Harbor Construction Corporation v. D.V. Frione & Co., 158 Conn. 14, 16, 255 A.2d 823 (1969). The state referee system, as a special tribunal, does not encroach upon, and does not unconstituionally compete with, other constitutional courts. On the contrary, as we noted in Florida Hill Road Corporation (p. 367), state referees "serve the very practical purpose of relieving the court's crowded dockets."

In the light of the clear language of the constitution and the consistent construction of the statute in this court, the plaintiff has failed to sustain her burden of demonstrating the unconstitutionality of Sec. 52-434. State v. Olds, 171 Conn. 395, 411, 370 A.2d 969 (1976); Wilson v.Connecticut Product Development Corp., 167 Conn. 111, 114, 355 A.2d 72 (1974); Kellems v. Brown, 163 Conn. 478, 486, 313 A.2d 53 (1972), appeal dismissed 409 U.S. 1099. 93 S.Ct. 911, 43 L. Ed.2d 678 (1973).

The plaintiff claims alternatively that the provisions of Sec. 52-434, even if not per se unconstitutional were invoked in her case in a manner so fatally defective as to deprive the referee of jurisdiction over the subject matter of her divorce,

The relevant portion of sec. 52-434 empowers a state referee to act when "the superior court. . with the written consent of the parties or their attorneys, has referred any case pending before such court." The plaintiff's motions to open the judgment challenges both the sufficiency of her consent to any order of reference and the existence of a valid order of the reference issued by the Superior Court.

The plaintiff's arguments concerning her lack of consent to a hearing before a referee is difficult to maintain in light of the express provision of sec. 52-434 which provides for reference "with written consent of the parties OR THEIR ATTORNEYS." (Emphasis added.) The record clearly shows that the plaintiff was represented by counsel, and that counsel signed a motion for reference to a state referee. It is hornbook law that clients generally arebound by the acts of their attorneys.Link v. Wabash R. Co., 370, 626, 633-34, 82 S. Ct. 1386, 8 L. Ed.2d 734 (1962);Butler v. Butler, 1 Root 275 (Conn. 1791). This court has held moreover, that objections to an order of reference should be raised by direct appeal, rather than by collateral attack on a judgment, unless it is necessary to open the judgment to "prevent a miscarriage of justice." Zingus v. Redevelopment Agency, 161 Conn. 276, 282, 287 A.2d 366 (1971).

There are no facts on the record before us that would warrant a conclusion that there has been a miscarriage of justice. The plaintiff claims that she was coerced by her attorney into agreeing to the order of reference and into appearing before the referee, but there are no findings of fact to support those allegations.

The plaintiff's argument would have us impose upon the defendant, as a condition of defending the finality of a judgment, the burden of establishing that the plaintiff's relationship with her counsel was one of informed consent. This we are not prepared to do.

Although the plaintiff in this collateral attack has not sustained her burden of establishing that the refusal to open judgment constitutes a miscarriage of justice, the questions indirectly raised by her appeal are not trivial. It may well be time to reconsider the role that lawyers and judges play in the matrimonial cases that appear in ever-increasing numbers before the courts. Analogies drawn from commercial litigation fail to respond adequately to the situation of emotional trauma commonly associated with the irretrievable breakdown of a marriage. In many other areas, this court has become increasingly willing to recognize the reality of emotional trauma. Recently, we have held that recovery, in tort, for unintentionally caused emotional distress, is permissible. Montiniero v. Southern New England Telephone Co., Conn. (40 Conn. L.J. No. 1, pp. 4, 6)(1978); we have recognized loss of conjugal companionship and affection as an element of damages for loss of consortium; Hopson v. St. Mary's Hospital, Conn (40 Conn. L.J. No. 30, pp. 5, 8)(1979); and we have taken account of acute emotional upset as a factor in weighing criminality of conduct. State v. Elliott, Conn (40 Conn. L.J. No. 36, p. 3)(1979). In many other states, there is a developing case law articulating the right of a patient to comprehensive consultation, to informed consent, before medical therapy is undertaken. See the well-reasoned discussion,

and the full citation of authorities, in Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972). Furthermore, other courts have held that the fiduciary responsibility of a lawyer to his client, particularly in matrimonial settlements, requires reasonable inquiry into the wishes as well as the objective best interests of the client. Compare Halvorsen v. Halvorsen, 3 Wash. App. 827, 479 P.2d 161 (1971), with Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966). We should recognize, therfore, that lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all the facts that materially affect the client's rights and interests. See Neel v. Magna, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 189, 491 P.2d 421 (1971); D. Rosenthal, Lawyer and Client; Who's in Charge, pp. 154-56 (Russell Sage 1974). We do not of course intend to imply that the plaintiff's counsel in her divorce proceedings failed to meet these high standards of professional responsibility. It is however noteworthy that the referee who accepted the stipulated divorce settlement and incorporated it into his decree did so completely upon the representations of counsel. Although both parties to the divorce proceedings were present, and despite the court 's affirmative obligation to determine whether a settlement agreement is "fair and equitable under all the circumstances"; General Statutes, Sec. 46-49, now sec. 46b-66; the referee made no inquiry whatsoever to ascertain the parties' actual consent to the proposal before him.[6] Because of the emotionally-laden circumstances under which negotiations about martial disso-

lutions necessarily take place, reasonable inquiries should be made to ensure, as far as possible, that reasonable settlements have been knowingly agreed upon. Nonethe-less, even judicial failure to conduct a searching inquiry into the acceptability of a divorce settlement does not make the subsequent judgment of divorce vulnerable to collateral attack as a miscarriage of justice.

The plaintiff's final claim is that the referee lacked jurisdiction over the subject matter of her divorce because there was no valid order of reference to the referee from the Superior Court. The record discloses only an entry in the jacket of the trial court file, dated June 1, 1972, purporting to represent an order by the Superior Court judge that the case be referred to Hon. Thomas E. Troland, trial referee. There is nowhere any order to the effect signed by the Superior Court judge. The record does indicate that the referee was notified, and that, without objection by the parties or their counsel, he conducted the proceedings leading to his rendition of the judgment of divorce.

The absence from the case file of a signed order is by no means conclusive evidence on the face of the record that the Superior Court judge never heard or acted upon the motion to refer the case. The record in its totality indicates either that the Superior Court judge overlooked signing his order of reference or that his signed order has been inadvertently misplaced. Such oversights are not jurisdictional defects for the purpose of collateral attack on a judgment. In other cases we have held that jurisdictional facts relating to service

of process or to notice are to be conclusively presumed in the case of a domestic court of general jurisdiction. Lampson Lumber Co. v. Hoer, 139 Conn. 294, 298, 93 A.2d 143 (1952); Sanford v. Sanford, 28 Conn. 6, 14, 17 (1859). The presumed regularity of process in the Superior Court was therefore sufficient to establish jurisdiction in the referee. The New York Court of Appeals, in a case closely analogous on the facts, has only recently cautioned against overly broad definition of subject matter jurisdiction. In Lacks v. Lacks, 41 N.Y.2d 71, 359 N.E.2d 384 (1976), that court was asked, on a postjudgment motion, to set aside a final judgment of divorce on the grounds of absence of subject matter jurisdiction because of failure to satisfy the statutory durational residence requirement. Chief Judge Breitel upheld the judgment, noting at length the ambiguities inherent in theconcept of subject matter jurisdiction. Lacks v. Lacks, supra, 74-77. A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. Id. 75. Lesser irregularities do not make a final judgment void.

There is no error.

In this opinion Bogdanski, Parskey, and Sponzo, Js., concurred. Cotter, C.J., concurred in the result.

FOOTNOTES

1. The phrase "open a judgment" is used synonymously with the phrase "vacate a judgment". See Poneleit v. Dudas, 141 Conn. 413, 416, 106 A.2d 479. (1954).

2. The relevant portion of General Statutes, Sec. 52-434 provides: "RETIRED JUDGES AS STATE REFEREES, HEARINGS, COMPENSATION, TRIAL REFEREES, APPOINTMENT OF ADDITIONAL REFEREES. Each judge of the supreme court, each judge of the superior court and each judge of the court of common pleas who ceases or has ceased to hold office because of retirement other than under Sec. 52-434 shall be a state referee during the remainder of his life. The superior court may, with the written consent of the parties or their attorneys, refer any case pending before such court in which the issues have been closed to such a state referee who shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in such cases.

3. Conn. Const. art II provides: (Distribution of powers.) The powers of government shall be divided into three distinct departments and each of them confided to a separate magistracy, to wit: whose which are legislative to one; those which areexecutive to another; and those which are judicial, to another."

4. Conn. Const. art. V, Sections 1, 2 and 6 provide: "Courts. Sec. 1. The judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law.

(Supreme and superior court judges, appointments, terms, removal.) Sec. 2. The judges of the supreme court and of the superior court shall, upon nomination by the governor, be appointed by the general assembly in such a manner as shall by law be prescribed. They shall hold their offices for a term of eight years, but may be removed by impeachment. The governor shall also remove them on the address of two-thirds of each house of the general assembly.

(Age limitation, exception.) Sec. 6. No judge or justice of the peace shall be eligible to hold his office afterhe shall arrive at the age of seventy years, except that a chief justice or judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee."

5. Conn Const. art 1, sec. 1 provides: "(Equality of rights.) Sec. 1. All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."

6. Since 1974, the statutory provision governing stipulated settlements in actions for dissolution of marriage or legal separation has expressly required that written stipulations, or oral in-court stipulations be made by the parties and not by their attorneys. General Statutes, Sec. 46-48, now Sec. 46b-51, as amended by Public Acts 1974, No. 74-169, Section 6.

APPENDIX

CONNECTICUT SUPERIOR COURT

New London County

NADINE O. MONROE

vs No. 36506

FLOYD R. MONROE, JR. April 11, 1978

MEMORANDUM ON
MOTION TO VACATE JUDGMENT

Daly, J.

Plaintiff instituted this action for divorce by writ, summons and complaint dated April 21, 1969. In May 1972, both parties through their counsel requested that the matter be referred to a state referee. On June 1, 1972 the matter was apparently referred to the Hon. Thomas E. Troland, although the file does not clearly reflect the order. The matter subsequently became uncontested and by stipulation a judgment was entered on February 6, 1973 declaring the parties divorced.

On January 14, 1978 the plaintiff, acting pro se has moved that the proceedings be vacated on the grounds that the proceedings be vacated on the grounds that the procedure to confer jurisdiction to the referee was not followed. Defendant moved to erase on the grounds that it was not filed within the term of court during which it was rendered. Judge Jacobs in a very scholarly memorandum dated March 6, 1978 granted the motion to erase.

On March 17 1978 the plaintiff filed another motion to vacate claiming the referee's powers are unconstitutional.

again the defendant moves to erase.

This court feels that the matter was very comprehensively covered by Judge Jacobs in his opinion. Furthermore, the common law limits the exercise of the power of the court to open or modify or vacate its judgment to the term of court at which the original judgment was rendered. Cicy v. Kostyk, 143 Conn. 688, 690.

Hence the defendant's motion to erase is granted and the plaintiff's motion is hereby denied.

Filed April 12, 1978.

APPENDIX

In The

CONNECTICUT SUPERIOR COURT

New London County

Nadine O. Monroe No. 36506

vs

Floyd R. Monroe, Jr. March 6, 1978

MEMORANDUM OF DECISION
ON
DEFENDANT'S MOTION TO ERASE

Jacobs, J.

Several years ago the petitioner and her husband voluntarily consented to submit their petition for dissolution of their marriage for determination by a state referee. The state referee subsequently entered a binding decree of dissolution which was accepted by both the petitioner and her husband.

The petitioner is now dissatisfied with the provisions of the decree, and now comes before this court pro se seeking to overturn it. The grounds of her petition are two-fold: (1) that since the constitution of Connecticut provides for a limitation upon the age of judges at 70 years of age, state referees (by definition judges over the age of seventy years) are constitutionally incapable of exercising judicial authority; and (2) that parties to an action cannot validly consent to submit to the authority of a court whose jurisdiction over them is invalid ab initio. For constituional and procedural reasons, this court finds the arguments advanced by the petitioner without merit.

The petitioner's argument that the Connecticut Constitution mandates the total and complete retirement of all judges at the age of seventy years is mistaken. True, prior to 1965 there was a constitutional provision removing the full array of judicial power of judges upon reaching the age of 70 years. But in 1965 a Constitutional Convention was convened in Connecticut to approve proposed changes in the state's constitution which, when duly adopted by the people of this state, would "be merged into and become integrated with existing provisions of the present constitution." Journal of the Constitutional Convention of Connecticut 1965, page 206. (Hartford 1965). One of the constitutional amendments proposed and adopted at the time is the present Article Fifth, Section 6. It reads as follows: "No judge or justice of the peace shall be eligible to hold his office after he shall arrive at the age of seventy years, except that a chief justice or judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee."

In the official resume of all amendments enacted by the Constitutional Convention, Article Fifth, Section 6 is construed as follows: "It also permits every retired judge of the supreme court, superior court or common pleas court after he has reached the age of seventy to act with the powers of the superior court or court of common pleas on matters referred to him as a state referee". Journal of the Constitutional

Convention of Connecticut 1965, p. 209, (Hartford, 1965). ". .(Interpretation) involves far more than picking out dictionary definitions of words or expressions used. Consideration of the context and the setting is indispensable to properly ascertaining a meaning. In saying that a verbal expression is plain and unambiguous, we mean little more than that we are convinced that virtually anyone is competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its contexta meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained or farfetched, or unusual or unlikely." Hutton v. Phillips, 45 Del. 156, 160. Thus, the intent and effect of the amendment, namely to invest state referees with all the powers of the referringcourt, could hardly be more clear. It is the province of the courts to interpret the constitution, and not to dismantle it. To carve out a section of our constitution, lawfully enacted by the will of the people is beyond the scope of this court's power. An article embodied in our constitution can only be removed by amendment or repeal, and the initiation of those two procedures also falls beyond the boundaries of this court's power.

The statute prescribing the manner in which state referees may exercise their judicial powers may be found in Section 52-434 of the General Statutes. It provides that judges retiring voluntarily or upon reaching 70 years of age automatically become a state referee capable of exercising "the powers of the superior court or the court of common pleas in respect to trial, judgment, and appeal in such cases" referred

to them by the courts. It is difficult, if not impossible, to construe Section 52-434 of the General Statutes as unconstitutional as it is derived from the explicit language of Article Fifth, Section 6 of the Constitution. And since Section 52-434 stems directly from an express provision in the Constitution, it does not violate the doctrine of separation of legislative and judicial powers.

Our Supreme Court has left no doubt as to the Constitutionality of Section 52-434. In Harbor Construction Corporation v. D.F. Frione & Co., 158 Conn. 14, the court stated that (p. 16): Article Fifth, Section 6, as implemented by statute, (Referring to the General Statutes, Sections 51-50f, 52-434, 52-434a) now authorizes a retired judge sitting as a referee to exercise on matters referred to him the powers of the referring court." The court also discussed the history, nature and jurisdiction of state referees in Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 362-68, In that case the court held that (p. 362): ". . . (a) state referee is not a 'judge of the superior court or the court of common pleas' but sits as a special tribunal, and is not restricted by the terms of Section 51-29." See also, Ruschak v. West Haven, 167 Conn 564,565 footnote 1. In the Florida Hill Road Corporation case, supra, the court took pains to point out the compelling public policy considerations underlying the use of state referees, one of the prime considerations being that (p. 367) "They serve the very practical purpose of relieving the court's crowded dockets of matters which can be more readily and conventiently tried in that manner. The duties of state referees are also usually

less rigorous than those of trial judges and are entirely consistent with the constitutional mandated retirement age for judges which 'rests upon a public belief that there comes a time in the life of a man when it is better for the public interest that he not be charged with the responsibility of continuous and daily work of so complete absorption as the high judicial office calls for.'"

In conclusion, this court holds that state referees are creatures of the constitution clothed with statutory authority and operating under judicial sanction. Upon the basis of express constitutional provision, explicit enabling legislation and our Supreme Court decisions, this court has no choice except to conclude that state referees are constitutionally capable of exercising judicial powers of the superior court and the court of common pleas in matters referred to them by those courts.

II

The petitioner's second claim is that the parties to the lawsuit can never validly and bindingly consent to submit to the authority of a court which in fact lacks jurisdiction over them. That the state referee possessed authority over the petitioner is evident from the above questions she raised. But even setting aside the question of the state referee's constitutionality, the petitioner's allegation is misplaced on purely procedural grounds.

It should be emphasized that the petitioner voluntarily consented to submit to the jurisdiction of the state referee; that she enjoyed the benefits of that decree for a number of years. "A party cannot claim benefits under a transaction . . and at the same time repudiate its obligations." 31 C.J.S., Estoppel Section 109, p. 559.

Connecticut has well established procedures for raising the issue of defective jurisdiction. A plea in abatement is available at the pre-trial level, and a motion to erase may be raised at any time during the trial. See Pr. Book, Sections 93, 94. Even an informal notice during the trial is sufficient to raise the jurisdictional question. Carten v. Carten, 153 Conn.603, 610. And should a court determine that there is a lack of jurisdiction, the parties may transfer their cause to the proper court. Section 52-32. However, where, as here, a party makes a general appearance and fails to claim lack of jurisdiction he is deemed to have waived his right to contest jurisdiction and cannot thereafter seek to overturn the judgment on jurisdictional grounds. Fine v. Weicke, 117 Conn. 683,684; Robertson v. Robertson, 164 Conn. 140,145.

Since the state referee's dissolution decree was a final judgment on the merits and the petitioner waived her rights to raise the issue of defective jurisdiction, the doctrine of res adjudicata now applies. Res adjudicata springs from the public policy against multiplicities of actions, and provides that equity will enjoin furtherlitigation of a cause of action which has already been adjudicated. As our Supreme Court has said: "A final judgment on the merits is conclusive on the parties to an action and their privies as to the cause of action involved. If the same cause of action is sued upon, the judgment is conclusive with respect to any claims relating to the cause of action which were actually made or might have been made." Bridgeport Hydraulic Co. v. Pearson, 139 Conn. 186, 196.

III

The court recognizes that the petitioner appearing pro se assumed a most difficult task, "Our courts, however, have always been lenient toward such a one, relaxing the rules wherever it can be done with propriety. . ." O'Connor v. Solomon, 103 Conn. 744, 745. The court had endeavored to search the record and has not granted the defendant's motion to erase this petition "out-of-hand". And while such a lengthy opinion covering all the issues raised by the petitioner has been time consuming nevertheless, the court has felt an obligation to see if it can find any reasonable grounds in support of her motion to vacate judgment for lack of jurisdiction. With all due respect to the petitioner who took the time and effort to file a brief in support of her claims, the court is duty bound to sustain the defendant's motion to erase.

For the reasons stated herein, the defendant's motion to erase is sustained.

Filed March 14, 1978.

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1833

NADINE O. MONROE, APPELLANT

FLOYD R. MONROE, JR., APPELLEE

AN APPEAL FROM THE SUPREME COURT

OF THE STATE OF CONNECTICUT

MOTION OF APPELLEE TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1833

NADINE O. MONROE, APPELLANT

FLOYD R. MONROE, JR., APPELLEE

APPEAL FROM THE SUPREME COURT OF CONNECTICUT

MOTION OF APPELLEE TO DISMISS APPEAL

Appellee moves that the appeal herein taken be dismissed on the grounds that the federal questions sought to be reviewed were not timely or properly raised, or expressly passed on, and that said appeal does not present a substantial federal question.

I

FACTS

This is an appeal from a decision of the Supreme Court of the State of Connecticut holding that the Superior Court of the State of Connecticut committed no error in denying two motions by the appellant to vacate a judgment of divorce entered in 1973.

The appellant and appellee were married in 1956 and divorced in 1973. Five years later the appellant initiated proceedings to vacate the judgment of divorce. The appellant filed two motions to vacate, one in January 1978 and another in March 1978. In response to each motion, the appellee countered with a motion to erase because the plaintiff's motions were not filed within the term of court in which the judgment of divorce had been rendered, and were hence untimely. The Superior Court denied the motions of the plaintiff and granted the motions of the defendant. (See Appendix to Jurisdictional Statement, pp. A-16 to A-24.) The plaintiff thereupon appealed each denial to the Supreme Court of Connecticut which, in a unanimous decision, found no error in the decisions of the Superior Court.

The basic facts relating to the divorce proceedings are as follows: the appellant initiated an action for separation or divorce in 1969. As amended in 1973, the complaint charged the appellee with intolerable cruelty, wilful desertion and adultery, and sought child custody and financial relief. The appellee, after reference

of the case to a state referee, consented to having the matter heard as uncontested on the appellant's complaint. A hearing was held by the referee on February 6, 1973 in accordance with this understanding. Both the appellant and the appellee were present in the courtroom; each was represented by counsel; neither was called upon to testify. Counsel for the appellant presented the appellant's amended complaint and proposed the terms of a stipulated settlement to be incorporated in the judgment file. Although the stipulation for settlement was in writing neither the appellant nor the appellee had signed it. Counsel informed the court that "each aspect" of the settlement had been discussed by each counsel with each client and that each was willing to accept its terms if the court found the settlement to be fair and reasonable. No issues or questions, federal or otherwise, were raised by either party at the hearing. The court granted the appellant a divorce on the ground of desertion and incorporated the stipulated settlement into its judgment decree. Neither party ever appealed from the entry of this judgment. The appellee subsequently remarried.

II

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT TIMELY OR PROPERLY RAISED, OR EXPRESSLY PASSED ON.

The decision of the Connecticut Supreme Court, printed in full in the Appendix to the Jurisdictional Statement at pages A-2 to A-15, discussed the

issues of the jurisdiction of the Connecticut Superior Court to hear motions to vacate divorce judgments after expiration of the term of court during which the divorce was granted, and of the jurisdiction of the Connecticut Supreme Court to hear appeals from decisions of the superior court denying motions to vacate divorce judgments. The court held that the superior court did have jurisdiction to hear the motions to vacate and that the Connecticut Supreme Court did have jurisdiction to hear the appellant's appeal. The Connecticut Supreme Court then passed on "the more wide-ranging of the plaintiff's [appellant's] claims," i.e., that §52-434 of the Connecticut General Statutes, authorizing retired superior court judges to sit as state referees and to hear and decide cases referred to them with the written consent of the parties or their attorneys, was unconstitutional under the Connecticut constitution. The provisions of §52-434 are printed in the appendix to this motion to dismiss. The relevant provisions of the Connecticut Constitution are quoted in footnotes 3-5, Opinion of Connecticut Supreme Court, Jurisdictional Statement, at pp. A-14, A-15. The Supreme Court of Connecticut quickly disposed of this argument by pointing to the express provision of the Connecticut Constitution, Article Fifth, §6, which expressly sanctions §52-434 of the General Statutes. Article Fifth, §6, is quoted in the Jurisdictional Statement p. A-7. The Connecticut court did not discuss or pass on any issue of the constitutionality of §52-434 under the Constitution of the United States.

The court held that the appellant's authorized attorney of record gave his written consent to the referral thus explicitly satisfying the procedural requirements of §52-434. Further, noting that the appellant had not appealed the 1973 judgment of divorce, the court held that the judgment was not subject to collateral attack five years after entry of the judgment. Finally, the court held that there was a valid reference from the superior court to the state referee. Nowhere in the opinion did the court pass upon any federal issue. It can rightfully be assumed that the omission of the Connecticut Supreme Court to pass upon a federal question "was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969) (citation omitted). "Proper presentation" means "'that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.'" Id. at 584, 89 S.Ct. at 1362, 22 L.Ed.2d at 580, quoting from New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928). At the trial in 1973 the appellant raised no federal issue whatsoever. Through counsel she consented to the terms of the judgment and took no appeal. Raising the issue more than five years later can hardly be considered "in due time." The Connecticut Supreme Court has a rule which states that "The Supreme Court shall not be bound to consider any errors on an appeal unless they are specifically

assigned or claimed and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial." Connecticut Practice Book §3063 (1978). "Perhaps the most striking application of the rule is that the supreme court will not ordinarily consider the constitutionality of the statute unless the claim was made in the trial court...." Maltbie, Connecticut Appellate Practice 387 (2d Ed. 1957). The Connecticut Supreme Court has applied this rule in many cases. See, e.g., State v. Spellman, 153 Conn. 65, 212 A.2d 413 (1965). Cf. Michigan v. Tyler, 436 U.S. 499, 512, 98 S.Ct. 1942, 1951, 56 L.Ed.2d 486, 500, N. 7 (1978), where this Court noted: "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this court so long as the state has a legitimate interest in enforcing its procedural rule."

It is also apparent, from the jurisdictional statement filed in this court, that the appellant has not, even at this stage, presented her federal claims "with fair precision."

The appeal should, therefore, be dismissed on the ground "that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on...." U.S. Supreme Court Rule 16.1(b).

III

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The appellant has alleged that §52-434 of the Connecticut General Statutes is violative of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. She alleges that she was denied her right to petition the government for a redress of grievances, due process of the law and equal protection of the law. (Jurisdictional Statement p. 10) She has not, however, described with any precision how she has in any way been deprived of her federal constitutional rights. She has cited no authority for her argument that §52-434 of the Connecticut General Statutes is violative of the Constitution of the United States, or for her claims that she was otherwise denied any of the protection afforded by the constitution.

The appellant argues that she was "denied a constitutionally appointed and constitutionally accountable judge of the superior court...." Jurisdictional Statement p. 10. It is clear, however, that under the Connecticut Constitution, Article Fifth, §6 (Jurisdictional Statement p. A-15) the state referee to whom a case has been referred with the consent of the parties or their attorneys is both constitutionally appointed and constitutionally accountable.

With respect to the Fourteenth Amendment "[I]t is fundamental rights

which the 14th Amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail." American Motorists Insurance Co. v. Starnes, 425 U.S. 637, 644-645, 96 S.Ct. 1800, 1804, 48 L.Ed.2d 273 (1976) quoting from Cincinnati Street R. Co. v. Snell, 193 U.S. 30, 36-37, 24 S.Ct. 319, 321, 48 L.Ed. 604, 607 (1904). Because the referee "shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in" cases referred to him, Connecticut General Statutes, §52-434, it is not open to challenge that fundamental rights are equally protected and preserved and that equal laws prevail in hearings before state referees, as before the superior court.

This court has consistently held "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). Appellant was afforded such opportunity in this case. §52-434 expressly provides for a full panoply of procedural safeguards by providing that the referee "shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in such case." Obviously, no party is obliged to have his or her case heard by a state referee--a case can be referred only "with the written consent of the parties or their attorneys." The case having been referred, the powers of the superior court were then held and exercised by the referee.

"The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'....The function of legal process, as that concept is embodied in the constitution, and in the realm of fact finding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depends on the need to serve the purpose of minimizing the risk of error." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, No. 78-201, __ U.S. __,

99 S.Ct. 2100, 2106, __ L.Ed.2d __ (1979). (citations omitted) There can be no question but that appellant was afforded all process due under the Fourteenth Amendment.

Appellant has also argued that she was deprived of the equal protection of the laws in that §52-434 "creates a class of constitutionally-deprived litigants." Jurisdictional Statement p. 11. This claim is also completely without merit. In the first place no party is obliged to have his or her case heard by a referee. The appellant's attorney consented to the referral in writing. Furthermore, the litigants before a state referee are not constitutionally deprived inasmuch as the state referee has and must exercise all of the powers of a superior court judge. In the state referee system "fundamental rights are equally protected and preserved" and "equal laws prevail." American Motorists Insurance Co. v. Starnes, 425 U.S. 637, 644-645, 96 S.Ct. 1800, 1804, 48 L.Ed.2d 263 (1976). Because there is no discrimination on the face of the statute or in its operation, there was no denial of the appellant's right to equal protection of the law.

"[W]hat procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and...history is surely relevant to these inquires." Cohen v.

Hurley, 366 U.S. 117, 130, 81 S.Ct. 954, 962, 6 L.Ed.2d 156, 165 (1961). The long and successful history of the referee system in Connecticut was traced in Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 365-366, 321 A.2d 856 (1973). There the court noted the "practical purpose" of the referee system "of relieving the [superior] court's crowded dockets of matters which can be more readily and conveniently tried in that manner." Id. at 367. The court observed that the position of state referee had served such purpose since 1889. Id. at 365. In addition to the right of appeal from the judgments of referees and in addition to the requirement that referrals be made only with consent, there are other safeguards. Contrary to appellant's assertion (Jurisdictional Statement p. 13) that referees are not subject to periodic renomination, review and reappointment, §52-434 specifically provides that "The chief justice of the supreme court may designate as trial referees, from among the state referees, those to whom cases may be referred, and no case of any adversary nature shall be referred to any referee other than one so designated....No such designation... shall be for a term of more than one year." (Appendix p. A-3) (The appellant's quotation of the statute, Jurisdictional Statement pp. 3-5 omits the sentence relative to trial referees.) Trial referees' "successive appointments by the chief justice are limited to a term

of not more than one year." Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 367 (1973).

Also contrary to appellant's assertion, (Jurisdictional Statement p. 13) state trial referees are liable to impeachment under the Connecticut Constitution, Article Ninth, §3: "The governor, and all other executive and judicial officers, shall be liable to impeachment...."

Furthermore, even where the parties consent to a referral, a referral is discretionary with the superior court which, in the words of §52-434, "may" refer cases to a referee.

The appellant's libelous statements concerning counsel and the state referee (e.g., Jurisdictional Statement pp. 7-8) have no support in the records, and indeed cannot be supported because they are false. The Connecticut Supreme Court, in the decision appealed from, specifically found that "there are no facts in the record before us that would warrant a conclusion that there has been a miscarriage of justice. The plaintiff claims that she was coerced by her attorney into agreeing to the order of reference and into appearing before the referee, but there are no findings of fact to support those allegations." (Jurisdictional Statement p. A-9)

The appellant alleges that, because the referees are over age 70,

"their physical and mental abilities are diminishing." (Jurisdictional Statement p. 13) She has offered no evidence in support of this conclusion. Furthermore, "The duties of state trial referees are usually less rigorous than those of trial judges and are entirely consistent with the constitutionally mandated retirement age for judges which 'rests upon a public belief that there comes a time in the life of a man when it is better for the public interest that he be not charged with the responsibility of continuous daily work of so complete absorption as the high judicial office calls for.'" Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 368 (1973).

The quotations from the three district court decisions and the one court of appeals decision cited by appellant do not support her claims.

Vecchione v. Wohlgemuth, 426 F.Supp. 1297 (1977) was a 42 U.S.C. §1983 suit challenging a Pennsylvania law authorizing seizure of property of mental health patients. The court, in denying the defendant's motion to vacate and/or modify, noted that the defendant's counsel, like the appellant's counsel here, had consented to the entry of the original decree. 426 F.Supp. at 1312. The court also noted the extraordinary length of time which elapsed between the time of entry of judgment and the time of filing a motion to vacate. 426 F.Supp. at 1309. (Two years had elapsed in Vecchione; five

years elapsed in the instant case.) Citing equitable principles the court also noted "the potentially damaging impact of 60(b) relief upon the party who, through litigation, had obtained what appeared to be a final judgment." 426 F.Supp. at 1311. Such principles are applicable in the instant case where the appellee, in reliance on the final judgment, remarried. The court in Vecchione, quoting from DiFrishia v. New York Central R.R., 279 F.2d 141 (3d Cir. 1960), stated that that "court's observations have special meaning in the present case: '[T]he defendant had its opportunity to have the [jurisdictional] issue heard and to present its position but chose to admit the allegations of the plaintiff's complaint. Thereafter it fully participated in the appropriate discovery and pretrial procedures preparatory to trial of the action on the merits....A defendant may not play fast and loose with the judicial machinery and deceive the courts.'" 426 F.Supp. at 1309.

Graciette v. Star Guidance, Inc., 66 F.R.D. 424 (D.C.S.D.N.Y. 1975), a suit in the district court alleging copyright infringement, in which the court held that a California district court had no in personam jurisdiction over a New York resident, has no bearing on the instant case.

Diva Laboratorium Aktiengesellschaft v. DeLoney & Co., 237 F.Supp. 868 (D.C.D.C. 1965), an action to compel the patent office to register a trademark, held that the late filing of the action did not deprive the court of subject matter jurisdiction and that the

defendant waived any claim in that regard by not raising the late filing as a defense. The court also held that failure to assert improper venue amounted to a waiver. In the instant case it has been established that the appellant through her authorized counsel of record consented to the reference to a state referee and consented to the judgment. It must, therefore, be held that she waived any claims in this regard. See opinion of Connecticut Supreme Court, Jurisdictional Statement, p. A-9.

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975), held that in a suit under 42 U.S.C. §1983 the Eleventh Amendment precludes an award of attorney's fees against a state. The case has no bearing on the instant case.

This is not the first time that the appellant has sought recourse to the federal courts alleging insubstantial federal questions pertaining to her divorce. See Monroe v. Gray, 553 F.2d 94 (2d Cir. 1977), cert. denied, 434 U.S. 827, 98 S.Ct. 104, 54 L.Ed.2d 85 (1977). The appellant's complaint in that case was dismissed for failure to state a claim upon which relief could be granted. The court of appeals affirmed and following the denial of certiorari by this Court, the appellant reverted to the state courts. Having failed in her claims before two Superior Court judges and the Connecticut Supreme Court, she again seeks to invoke the jurisdiction of the federal judiciary. Her claims now are no more substantial than they

were in the prior litigation.

IV

CERTIORARI SHOULD BE DENIED.

The appellant has requested that the appeal "be regarded and acted upon as a petition for a writ of certiorari." (Jurisdictional Statement p. 2) Because there are no special and important reasons therefor, because the Connecticut Supreme Court has not decided a federal question of substance not theretofore determined by this Court, and because the Connecticut Supreme Court has not decided a federal question in a way probably not in accord with applicable decisions of this Court, a petition for a writ of certiorari should be denied. U.S. Supreme Court Rule 19.1(a).

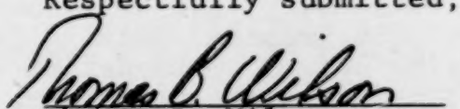
V

CONCLUSION

For the reasons stated the appellee's motion to dismiss the appeal should be granted and the appeal dismissed.

Dated at Groton, Connecticut, this 28th day of June 1979.

Respectfully submitted,



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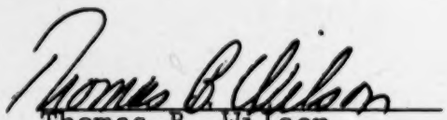
I, Thomas B. Wilson, attorney for Floyd R. Monroe, Jr., Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of July 1979 I served three copies of the foregoing motion of appellee to dismiss appeal on all parties required to be served as follows: on Nadine O. Monroe, appellant, by mailing three copies in a duly addressed envelope with first class postage prepaid to Nadine O. Monroe, 16 Morgan Street, New London, Connecticut 06320.



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1833

NADINE O. MONROE, APPELLANT

FLOYD R. MONROE, JR., APPELLEE

APPEAL FROM THE SUPREME COURT OF CONNECTICUT

APPENDIX TO
MOTION OF APPELLEE TO DISMISS APPEAL

Thomas B. Wilson
Counsel for Appellee
1028 Poquonnock Road
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Connecticut General Statutes, §52-434. Retired judges as state referees. Hearings. Compensation. Trial referees. Appointment of additional referees.

Each judge of the supreme court, each judge of the superior court and each judge of the court of common pleas who ceases or has ceased to hold office because of retirement other than under the provisions of section 51-49 shall be a state referee during the remainder of his life. The superior court may, with the written consent of the parties or their attorneys, refer any case pending before such court in which the issues have been closed to such a state referee who shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in such case. Each judge of the circuit court who has ceased to hold office because of retirement other than under the provisions of section 51-49 shall be a state referee during the remainder of his life to whom the superior court may, with the written consent of the parties or their attorneys, refer any case pending in such court in which the issues have been closed and which the judges of the superior court may establish by rule to be the kind of case which may be heard by such referees. Such referee shall hear such case and report the facts to the court by which the case was referred. Each judge of the juvenile court who ceases or has ceased to hold office because of retirement other than under the provisions of section 51-49

shall be a state referee during the remainder of his life to whom a judge before whom any juvenile matter is pending may, with the written consent of a child concerned, either of his parents or his guardian or his attorney, refer any juvenile matter pending. Such referee shall hear such matter and report the facts to the court for the district from which the matter was referred. Each hearing by a state referee shall be held in a suitable room, to be provided by the commissioner of administrative services, in a courthouse in the judicial district where the case is pending unless the parties or their attorneys stipulate in writing that such hearing may be held elsewhere. Such state referee may have the attendance of a sheriff or deputy sheriff at any hearing before him, and such sheriff or deputy sheriff shall receive the same compensation provided for attendance at regular sessions of the court from which the case was referred which compensation shall be taxed by such state referee in the same manner as similar costs are taxed by the judges of the court. Such state referee may compel the attendance of any witness summoned to appear before him at any hearing, in the same manner as attendance of any witness may be compelled in the referring court, and may punish for any act of contempt committed in his presence while engaged in such hearing in the same manner and to the same extent as judges of such court. Each state referee shall receive, for acting as such referee or as a single auditor or committee of any court, in addition to his retirement salary,

the sum of one hundred dollars and his expenses, including mileage, for each day he is so engaged, said sums to be taxed by the court making such reference in the same manner as other court expenses. The chief justice of the supreme court may designate as trial referees, from among the state referees, those to whom cases may be referred, and no case of any adversary nature shall be referred to any referee other than one so designated. The chief justice may also appoint, from qualified members of the bar of the state, so many state referees as he may from time to time deem advisable or necessary. No such designation or appointment shall be for a term of more than one year. Each state referee appointed by the chief justice from members of the bar shall receive such reasonable compensation and expenses as may be determined by him.